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7 May 2019

The Commissioner
Special Commission of Inquiry into the Drug "Ice"
GPO Box 5341
Sydney NSW 2001
Dear Commissioner

Submission to the Special Commission of Inquiry into the Drug "Ice"

Pursuant to the invitation to make a submission, I am writing on behalf of the NSW Bar Association. This submission is made in respect of Issues Paper 2 *Justice*.

Introduction

I note that one of the matters that you are requested by the Letters Patent to inquire into and report on is:

Options to strengthen NSW's response to ice and illicit ATS, including law enforcement, education, treatment and rehabilitation responses.

"ATS" refers to "amphetamine-type stimulants", which includes methamphetamine in crystalline form (also known as "ice"), amphetamine and 3,4 Methylenedioxymethamphetamine (MDMA), also known as "ecstasy". In the light of the reference to "education, treatment and rehabilitation responses" as well as "law enforcement", I interpret the word "strengthen" to mean "improve", rather than conveying any (necessarily) punitive element.

Given that, the Association submits that it is important for the Inquiry to consider these illicit drugs in the broader context of drug policy. Assessment of the harm resulting from these particular drugs should include consideration of those harms resulting from heavy reliance on law enforcement. The focus should be on developing effective strategies for reducing drug-related harm, increasing the number of drug dependent users seeking treatment (thereby reducing the number of drug dependent users) and implementing effective demand reduction strategies. That would be the best way to improve "NSW's response to ice and illicit ATS".

It is the position of the Association that consideration should be given to decriminalisation of personal acquisition, possession and use of illicit drugs, with increased focus on treatment and harm reduction measures. There should also be encouragement of diversionary measures for minor matters that remain criminalised. Such an approach would involve:

- the continued application of criminal sanctions for drug producers, traffickers and suppliers

- decriminalisation of personal acquisition, possession and use of all currently illicit drugs (including ice and illicit ATS).
- the use of civil orders to deal with personal acquisition, possession and use of all currently illicit drugs (including ice and illicit ATS), through a comprehensive framework of community-based tribunals
- the expansion of harm reduction measures and drug treatment services.

Continued application of criminal sanctions with respect to drug producers and traffickers, with increased focus on diversion for minor offences

The Association does not suggest that production, trafficking and supply of illicit drugs should be decriminalised.

However, for relatively minor offences involving production, trafficking or supply of illicit drugs where the offender was drug-dependent, there should be an increase in the availability of diversionary measures and an increased focus on rehabilitation in sentencing. In relation to sentenced offenders, such measures should be available within the custodial setting, on community based sentencing orders and parole orders.

Of course, if personal acquisition, possession and use of all currently illicit drugs continues to be subject to criminal penalties, there should also be an increase in the availability of diversionary measures for such offences.

An increased availability of diversionary measures has particular significance for Indigenous offenders. ATS abuse is a particular consideration for Indigenous communities, both urban and rural. There is evidence that Indigenous communities are more at risk of developing problematic ATS use because of the complex issues already facing those communities, such as racism and discrimination, higher rates of social breakdown, poorer physical and mental health, higher unemployment and highly disproportionate rates of incarceration.¹ There are insufficient diversionary programs for adults, particularly programs that deal specifically with the needs of women and, more particularly, the needs of Aboriginal women. This is an area that needs reform. In the case of Indigenous offenders, diversionary programs which work well involve a cultural component that allows the participant to reconnect with country, culture and history. An example of a successful diversionary program is the residential rehabilitation program at the Glen.

Anecdotally the program achieves a significant rate of success. Its success appears to be related to the emphasis placed on culture. The Glen currently only takes Indigenous men however, on the basis of its accepted successes to date, it has just been approved funding to establish a service for women. The Association understands that this will be the first such service for Indigenous women in the State.

The Association also understands that a number of District Court judges have been confronted with cases where an offender would benefit from a diversionary program but beds are unavailable

¹ Commonwealth Parliamentary Joint Committee on Law Enforcement, Inquiry into crystal methamphetamine (ice): First Report, September 2017, at [255]

or will not be available for some time. In practice, this can frustrate the Court's capacity to grant bail, order a section 11 remand or impose a community-based sentencing option. The barriers to accessing diversionary programs largely relate to the availability of well-resourced programs in the community that provide appropriate treatment, supervision and monitoring. The barriers for female offenders are largely a product of the unavailability of programs that specifically deal with the issues facing women. The barriers to accessing diversionary programs are particularly notable in regional NSW. Consideration should be given to designing programs that deal with subpopulations, for example:

- Culturally appropriate programs for Aboriginal and Torres Strait Islander participants that are culturally relevant and appropriate and that are run by community-based organisations. These programs will better deal with the intergenerational trauma that is prevalent amongst Aboriginal and Torres Strait Islander offenders.
- Programs designed specifically for female offenders. Many female offenders who use ATS have been the victims of domestic violence and sexual abuse. These women require specifically designed programs to treat this underlying trauma which often lead to the addiction in the first place.

In addition, diversionary programs should take a holistic approach to treatment providing wraparound services to assist participants in the process of recovery and to reduce the likelihood of relapse. Many ATS users have underlying psychiatric and psychological issues that must also be treated. They often have medical and economic problems that also require attention. The most effective diversionary programs are those that address not only the addiction but other related issues such as employment, housing and parenting skills.

In the case of Indigenous offenders who come before the court having committed ATS related offences, the most effective way of providing diversionary programs is to establish an Indigenous sentencing court. Such a Court is best placed to direct offenders to suitable diversionary programs, monitor their progress and provide the wraparound services necessary to promote rehabilitation and reduce the likelihood of relapse and recidivism. The Walama Court Proposal which has been submitted to the NSW Attorney-General for the establishment of the Walama District Court, a specialist Indigenous sentencing court, seeks to achieve these goals. The proposal emphasises the use of culturally appropriate diversionary programs for drug-user offenders, following the success of similar Indigenous courts in Victoria and Canada. It is strongly recommended that this proposed court be established in Sydney and, if successful, extended.

The use of civil orders for personal drug acquisition, possession and use

The introduction of civil orders to deal with personal drug acquisition, possession and use would alleviate the harms caused by the criminalisation of drug use, while facilitating a public health approach to the use of drugs. This approach is closely modelled on that adopted in Portugal in 2001, which successfully decriminalised personal acquisition, possession and use of all illicit drugs.

At that time UN Secretary-General Guterres, who was Prime Minister of Portugal at the time of its drug reforms, said that “*the government assumed its responsibilities for prevention and treatment – rooted in the conviction that drug addicts are victims who need treatment rather than punishment*”. The Portuguese model has been successful, particularly in reducing levels of problematic use and psychopharmacological and economic-compulsive crime. The court system has become more efficient, the number of users seeking treatment has increased and levels of drug-related harm and mortality have decreased – all without any significant increase in the overall levels of drug use.

A fundamental element of any such reform would be the creation of local tribunals which would deal with instances of personal drug use as they arise. The composition, powers and function of those tribunals could be based on the Portuguese model which has one tribunal for each region, comprised of three individuals. One of those individuals is a lawyer and the other two may be social workers or psychologists. Whether such a model would be appropriate in an Australian context, or whether a slightly different model should be adopted, would be determined by the Government in consultation with the relevant stakeholders. However, the overriding purpose of the tribunals should be to examine the circumstances of the individual user, and determine whether the individual’s drug use is problematic in nature. If so, the tribunals would be in a position to make a range of civil orders (subject to non-criminal sanctions if breached), including requirements to engage with available treatment and rehabilitation services. It is expected that the cost of establishing and maintaining such tribunals would be offset by savings from other sectors such as police, courts and corrections, resulting from decriminalising personal use offences.

The success of the approach in Portugal does not necessarily ensure the successful application of such approach in this country. However, the Portuguese model appears to represent best practice in the implementation of civil orders in addressing illicit drug use and in the alleviation of drug related harm.

Harm reduction and treatment programs

The success of the proposed reforms is contingent on substantially increased funding for harm reduction and treatment programmes. Harm reduction measures would include steps designed to reduce the adverse consequences of illicit drugs supplied in an unregulated black market. The proposed framework assumes that there will be adequate services to which drug users can be referred. Drug treatment services are currently unable to meet demand. A recent assessment of alcohol and other drug treatment provision found that approximately 200,000 people a year receive treatment. Unmet demand per annum has been conservatively estimated to be between 200,000 and 500,000 people. This is the case notwithstanding that alcohol and other drug treatment is exceptionally cost effective, returning \$7 for every \$1 invested.²

² Ettner, S. Huang, D., Evans, E., Ash, D., Hardy, M., Jourabchi, M., et al. (2006). Benefit-cost in the California treatment outcome project: does substance abuse treatment “pay for itself”? *Health Services Research*, 41(1), 192-213.

Rationale: Assessment of harm

While acknowledging that the consumption of drugs is harmful to the individual, the criminalisation of personal drug use may result in greater harm to the individual, and to society more broadly.

Harms suffered by the community from general drug use include loss of public amenity, the burden on the public health system, diminished productivity and crime. A more exhaustive list would include harms to the community from corruption, decreased national productivity and the seemingly uninhibited proliferation of an international and intra-national black market for drugs. As stated in Issues Paper 1 at page 10, “[o]rganised crime syndicates are linked with supply and distribution chains at all levels”. Some of these harms result from the criminalisation of drug use, rather than drug use in and of itself. There is no doubt that organised crime networks rely on prohibition for their business model and profit margins.

Amphetamine use undoubtedly has the potential to be harmful, but the actual number of deaths resulting from such use does not compare with alcohol and tobacco. Further, generally speaking, the greatest harms are more likely to be suffered by dependent users of drugs. Even though all drugs can be addictive, only a minority of individuals who use illicit drugs become dependent on them. Many people who use drugs are rational consumers insofar as they make a deliberate choice to take a drug or drugs to achieve a desired effect.

Importantly, there are considerable harms associated with the criminalisation of personal drug use. The legacy of involvement in the criminal justice system can be far-reaching and long-lasting. It can affect a person’s ability to obtain and maintain employment, housing and education. Those who are incarcerated are exposed to more serious offenders. Incarceration substantially increases the risk of mortality. The criminalisation of personal drug use affects personal wellbeing and relationships. Social stigma and the activities of law enforcement can also undermine the implementation of harm reduction measures.

Rationale: Ineffectiveness of criminal prohibition

The 2018 Commonwealth Joint Parliamentary Committee on Law Enforcement’s *Inquiry into crystal methamphetamine* concluded that “the current approach in Australia is not working” and noted that when former law enforcement officials and agencies themselves are saying “Australia cannot arrest its way out of the methamphetamine problem” such a view must be taken seriously”.³ Law enforcement efforts are predominantly focused on supply reduction. In theory, the reduction in supply should, in turn, reduce the levels of use and therefore reduce levels of drug related harm. However, it has not been established that this objective is being met. Research suggests that increased efforts by law enforcement to reduce supply do not affect levels of drug-related crime, or the number of arrests for drug possession and use.

³ Commonwealth Parliamentary Joint Committee on Law Enforcement, *Inquiry into crystal methamphetamine (ice)* (Final Report, 2018) 158.

As noted in Issues Paper 1 at page 5, it is difficult to determine the prevalence of ATS use in NSW, partly because it is illicit. However, it is apparent that, across Australia, use of both methamphetamines and MDMA is increasing. One measure of effectiveness is drug availability. As stated in Issues Paper 1 at page 10, available evidence indicates that crystal methamphetamine and MDMA are both “easy” or “very easy” to obtain by users. Another measure is price. As stated in Issues Paper 1 at page 11, prices for these drugs have remained stable or, in some cases, have dropped, in recent years.

It has been argued that law enforcement efforts increase the risks associated with drug dealing, which increase price and decrease levels of use. However, the question of whether use of a drug is ‘price-elastic’ is a complex one, and some argue that increasing the price of drugs merely increases the incentive to trade in illicit drugs, and increases the likelihood that those drugs will be ‘cut’ with dangerous additives. The only apparent benefit of supply reduction efforts are increased risks of incarceration for the drug producers, suppliers and traffickers. This arguably increases the cost to the drug consumer and, according to standard economic theory, will lead to lower levels of drug consumption. However, neither the relationship between efforts to reduce supply and prices, or the application of standard economic theory to drug use, is universally accepted. There is little evidence to support the argument that supply reduction measures have been effective at reducing the supply of drugs, levels of drug use or drug related harm.

The criminalisation of conduct occurring frequently in society, such as personal drug use and possession for the same, is something that requires careful consideration. Justification for criminal sanctions is often based on an argument that criminal sanctions will:

- secure incapacitation of the offender (that is, physically prevent the offender from re-offending);
- exact retribution upon the offender for the harm that they have inflicted upon another and/or society;
- deter the offender (specific deterrence) and others (general deterrence) from engaging in criminal behaviour; and
- assist the offender to be rehabilitated.

Each of these arguments requires closer consideration so far as they concern personal possession and drug use. As regards incapacitation, a study found that 46% of participants reported using illicit drugs during their time in prison. As regards retribution, drug dependence is a medical condition, so in the absence of a concomitant crime such as property crime to obtain funds to purchase drugs (which may be punished in its own right), it is hard to justify criminal sanction on that ground. Punishment and retribution imposed under the criminal law in order to try to achieve some deterrent effect can be a blunt, and sometimes brutal, mechanism of community education and control. In any event, a link between heavier penalties and increased deterrent effect has not been established. The compulsion involved in drug dependence makes it unlikely that specific deterrence will be effective. It may have a greater deterrent effect on non-dependent users but research suggests that a drug’s illicit status is not a significant factor in the decision to take an illicit drug.

The objectives set out in the Australian Drug Strategy, to reduce the supply of illicit drugs, demand for drugs and harms associated with drug use, are not being achieved through the current approach. Law enforcement has been an extremely costly and largely ineffective as the main strategy for reducing levels of drug availability and use. A focus on reducing demand and harm reduction through the adoption of a public health approach may result in a better model that creates an environment supportive of treatment and allows drug users to be included in the society of which they form a part.

International Conventions

It is the understanding of the Association that decriminalisation of personal acquisition, possession and use of illicit drugs on the Portuguese model is consistent with the United Nations Conventions dealing with illicit drugs.

The way forward

The current policy has not proved effective at minimising the harms associated with drug use. As the predominant tool, it may cause harm to personal drug users and to the community more generally. Decriminalisation of personal acquisition, possession and use of illicit drugs would allow the implementation of a comprehensive public health approach. This would be complemented by the use of civil orders, the expansion of harm reduction measures and drug treatment services with the continuing application of criminal sanctions for drug suppliers, producers and traffickers.

Yours sincerely



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